

APPENDIX

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DAVID J. HILL, THEATRE I, ET AL.,

Petitioners,

vs.

DAVID R. BLANTON, DISTRICT ATTORNEY,  
ATLANTA JUDICIAL DISTRICT, ET AL.,

Respondents.

ON PETIT OF CERTIORARI  
FROM THE SUPREME COURT OF GEORGIA

PETITION FOR REHEARING

DAVID J. HILL, THEATRE I and Partis

Bill Theatre II. Petitioners in the

within proceedings, by and through their

attorney present this, their Petition for

rehearing of the above entitled matter,

United States Constitution

First Amendment

First Amendment

Minority Report of  
the Commission on  
Government



IN THE  
SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1971

NO. 71-1051

---

PARIS ADULT THEATRE I, ET AL,

Petitioners,

vs.

LEWIS R. SLATON, DISTRICT ATTORNEY,  
ATLANTA JUDICIAL CIRCUIT, ET AL,

Respondents.

ON WRIT OF CERTIORARI  
FROM THE SUPREME COURT OF GEORGIA

---

PETITION FOR REHEARING

---

Paris Adult Theatre I and Paris  
Adult Theatre II, Petitioners in the  
within proceedings, by and through their  
counsel present this, their Petition for  
a rehearing of the above entitled cause,

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1081

JAMES EARL RAY, ET AL.,  
Petitioners,

vs.

JOHN A. EDGAR, DISTRICT ATTORNEY,  
ALABAMA JUDICIAL CIRCUIT, ET AL.,

Respondents.

ON WRIT OF CERTIORARI  
FROM THE SUPREME COURT OF ALABAMA

PETITION FOR REHEARING

JAMES EARL RAY, ET AL.,

James Earl Ray, et al., Petitioners in the

above proceedings, by and through their

counsel present this, their petition for

rehearing of the above entitled case.

and in support thereof respectfully show:

The decision and order of this Honorable Court was issued on June 21, 1973 and the majority of the Court concluded the text of the opinion with the following sentence:

"The judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this opinion and Miller v. California, supra. See United States vs. 12-200 Ft. Reels, U.S. \_\_\_\_\_, (p. 7, n.7) (1973)."

The petition for rehearing of decision and judgment of this Court is filed pursuant to Rule 58(1) of the U. S. Supreme Court Rules and is being submitted within twenty-five (25) days after entry of judgment as required.

As grounds for this petition, Petitioners respectfully request the

and in support thereof respectfully submit:

The decision and order of this

Honorable Court was issued on June 21, 1973

and the majority of the Court concluded

the text of the opinion with the following

language:

"The judgment is vacated  
and the case remanded to  
the Georgia Superior Court  
for further proceedings  
not inconsistent with  
this opinion and Miller  
v. California, supra.  
See United States vs.  
12-200 P. Reels,  
12-200 P. Reels,  
12-200 P. Reels, 12-200 P. Reels."

The petition for rehearing of

decision and judgment of this Court is

filed pursuant to Rule 26(1) of the G.S.

Georgia Court Rules and is being submitted

within twenty-five (25) days after entry

of judgment as required.

As grounds for this petition,

petitioners respectfully request the

Court's consideration of the following:

I.

THE VACATION OF THE JUDGMENT  
IN THIS CASE AND THE REMAND  
TO THE GEORGIA SUPREME COURT  
FOR "FURTHER PROCEEDINGS"  
LEAVES UNCONSTITUTIONALLY  
VAGUE WHAT THE DUTY IS THAT  
IS IMPOSED UPON THE APPELLATE  
COURT WITH REGARD TO "FURTHER  
PROCEEDINGS."

This Court concluded its decision of the Court in this case with the following ruling:

"The judgment is vacated  
and the case remanded to  
the Georgia Supreme Court  
for further proceedings  
not inconsistent with  
this opinion and Miller  
vs. California, supra.  
See United States vs.  
12-200 Ft. Reels, \_\_\_\_\_ U.S.  
\_\_\_\_\_, (p.7, n. 7)"

One reading the decisions of  
this Court promulgated on June 21, 1973  
and the viewing of the actions of this  
Court invacating and remanding to the

Consideration of the following:

THE VACATION OF THE JUDGMENT  
IN THIS CASE AND THE REMAINING  
TO THE GEORGIA SUPREME COURT  
FOR FURTHER PROCEEDINGS  
LEAVES UNCONSTITUTIONALLY  
ABOUT WHAT THE DUTY IS THAT  
IS IMPOSED UPON THE APPELLATE  
COURT WITH REGARD TO FURTHER  
PROCEEDINGS.

This Court concluded its deci-

sion of the case in this case with the

following ruling:

The judgment is vacated  
and the case remanded to  
the Georgia Supreme Court  
for further proceedings  
not inconsistent with  
this opinion and either  
as California, supra,  
see United States v.  
11-500 P.2d 841, 37  
(P.2d 841).

One reading the decision of

this Court promulgated on June 11, 1973

and the viewing of the actions of the

Court investigating and responding to the



lower courts of approximately sixty (60) other obscenity cases for "further proceedings" would most assuredly be left in a quandary as to what the various State and federal appellate courts are supposed to do with the cases upon remand.

Several possibilities may be suggested as to what the Court has done by its decision to the case at bar. If the action of the Court viewed by competent counsel for the various parties and others similarly situate, provokes a sharp difference of opinion as to the intended and probable effect of the various decisions, how then can men and women not trained in the law understand the exquisite and subtle meaning suggested by the plain words of the decisions. Among the possible inferences to be drawn as to what the "further proceedings" are that are to be considered by the Georgia Supreme Court in the case

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probable effect of the various decisions,  
how then can men and women not trained in  
the law understand the expressive and ambiguous  
meaning suggested by the plain words of  
the decisions. Having the possible inter-  
ference to be drawn as to what the "further  
proceedings" are that are to be considered  
by the Georgia Supreme Court in the case

at bar are the following:

- A. THE GEORGIA SUPREME COURT  
MAY REVIEW THE EVIDENCE TO  
DETERMINE WHETHER THE  
MOTION PICTURE FILMS ARE  
OBSCENE IN THE CONSTITUTIONAL  
SENSE UNDER THE NEWLY  
ANNOUNCED TRI-PARTITE TEST  
SET FORTH IN MILLER VS.  
CALIFORNIA, \_\_\_\_\_ U.S. \_\_\_\_\_  
(1973).

This view is taken by many prosecutors across the land as judged on the basis of newspaper accounts and as United Press International and Associated Press summaries would indicate.

Counsel for Paris Adult Theatres would reject this suggested approach on the basis that the Georgia statutory scheme, employing as it does the utilization of a statutory definition lifted out of the opinion of the plurality in Memoirs vs. Attorney General, 383 U.S. 431 (1966), would concededly be a more

of the following:

THE GEORGIA SUPREME COURT  
MAY REVIEW THE EVIDENCE TO  
DETERMINE WHETHER THE  
MOTION PICTURE FILMS ARE  
OFFENSIVE IN THE CONSTITUTIONAL  
SENSE UNDER THE RESULT  
ANNOUNCED IN THE CASE THAT  
WENT FORTH IN 1951 AS  
CALIFORNIA, U.S.  
(1951)

This view is taken by many people  
across the land as judged on the  
basis of newspaper accounts and an United  
States International and Associated Press  
statement would indicate.

Counsel for both Adult Theater  
would reject this suggested approach as  
the basis that the Georgia Attorney  
General, employed as it does the rights  
of a majority definition listed out  
of the opinion of the minority in  
Harris vs. Attorney General, 195 U.S.  
101 (1955), would concede as a matter

liberal test than the permissible scope of regulation set forth in Miller vs. California, supra., and the Georgia Supreme Court could hardly be expected to find the motion picture films involved in this case to be protected expression under this less liberal and more restrictive doctrine.

If this were the intended and probable course of action envisioned by the majority of this Court in vacating the judgments and remanding for further proceedings the approximate sixty-eight (68) cases involving obscenity-pornography, as it did on June 21 and June 25, 1973, then each of those sixty-eight (68) cases, together with each and every new case that has already arisen in the interval since the Court's decision and which will continue to arise, will be back to the Court's docket, and the fears of an inundation of obscenity cases as suggested

liberal test than the permissible scope

of regulation set forth in Miller vs.

California, supra, and the Georgia Supreme

Court could hardly be expected to find the

action picture films involved in this case

to be unprotected expression under this test

liberal and more restrictive doctrine.

It thus were the intended and

probable course of action envisioned by the

majority of this Court in reaching the

injunction and remanding for further pro-

ceedings the approximate sixty-eight (68)

cases involving obscenity-pornography, as

it did on June 21 and June 22, 1957, that

each of those sixty-eight (68) cases

together with each and every new case

that has already arisen in the interval

since the Court's decision and action will

continue to arise, will be back to the

Court's docket, and the fear of an in-

undation of obscenity cases as suggested



by Mr. Justice Brennan and rejected by the majority will no longer be a fanciful guesstimate, but a realistic problem.

- B. THE GEORGIA SUPREME COURT MAY REVIEW THE STATUTE AS ENACTED BY THE LEGISLATURE TO DETERMINE WHETHER IT CAN AUTHORITATIVELY CONSTRUER THE SAME TO ENGRAFT UPON IT THE CONSTITUTIONAL STANDARDS SET FORTH IN MILLER VS. CALIFORNIA, WHILE NOT APPLYING THE PURELY PROSPECTIVE RULING TO THE PARTIES BEFORE THE COURT.

This Court, by its majority opinion in vacating and remanding the judgment of the Georgia Supreme Court in the case at bar, made special effort to refer to the parties (n.7, p. '7 of the slip opinion in U. S. v. 12-200 Ft. Reels).

The footnote reads in pertinent part as follows:

by Mr. Justice Brennan and rejected by  
the majority with no dissent or dissent  
and dissents, but a realistic problem.

THE GEORGIA SUPREME COURT  
MAY REVIEW THE STATUTE AS  
ENACTED BY THE LEGISLATURE  
TO DETERMINE WHETHER IT  
CAN AUTHORITATIVELY CONSTRUCT  
THE CASE TO ENACT THAT  
IT THE CONSTITUTIONAL STATE  
MAY BE SET ASIDE BY MILLER  
VS. CALIFORNIA, WHILE NOT  
APPLYING THE BURDEN PROOF  
EFFECTIVE RULING TO THE  
PARTIES BEFORE THE COURT.

This Court, by its majority  
opinion is vacating and remanding the  
judgment of the Georgia Supreme Court in  
the case at bar, made special effort to  
refer to the parties in U.S. v. 11-100 T.  
also opinion in U.S. v. 11-100 T.

The footnote reads in part:  
The part as follows:

"We further note that, while we must leave to State courts the construction of State legislation, we have a duty to authoritatively construe federal statutes where 'a serious doubt of constitutionality is raised. . . 'and construction of the statute is fairly possible by which the question may be avoided.'

If we are to take that part of the note and apply it to the case at bar, it would lend support to the theory that this Court's action in vacating and remanding for further proceedings was intended to permit the Georgia Supreme Court to make an authoritative judicial construction of a State statute.

It would appear that the necessity which compelled this Court to enunciate new constitutional standards for judging obscenity was the recognition by eight (8) members of this Court (excluding

We further note that while we must leave to the state courts the construction of state legislation, we have a duty to authoritatively construe federal statutes where a serious doubt of constitutionality is raised. And concerning the scope of the statute is fairly possible in which the question may be avoided.

It is not to take that part of the note and apply it to the case at bar. It would tend support to the theory that this Court's action in vacating and remanding the further proceedings was intended to bring the Georgia Supreme Court to have an authoritative judicial construction of a state statute.

It would appear that the necessity which compelled this Court to consider new constitutional standards for state legislation was the recognition by state members of this Court (excluding

Mr. Justice Douglas, whose dissent was upon other grounds) that the standards for judging obscenity were unconstitutionally vague and failed to give "fair warning" to an individual that his proposed course of conduct would subject him to criminal prosecution.

It was only as to the issue of how the vagueness problem might be rectified that the justices divided sharply -- five (5) joining in an opinion to set forth a new constitutional definition of obscenity and three (3), including Mr. Justice Brennan, holding that the definition of obscenity was so obscure that it could not be appropriately defined.

Mr. Justice Brennan makes a suggestion in his dissent in Miller vs. California, supra, that all States other than Oregon must now enact new obscenity

Mr. Justice Douglas, whose dissent was  
very often grounded that the standards for  
judging obscenity were unconstitutionally  
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It was only as to the issue of  
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be appropriately defined.

Mr. Justice Brennan takes a  
position in his dissent in Miller vs.  
California, says that all States other  
than Oregon were now and obscenity



statutes and Mr. Chief Justice Burger, in his opinion for the majority, at footnote 6, disagrees with Mr. Justice Brennan's view of the effect of the holding of the majority and adds this caveat:

"Other existing State statutes, as construed heretofore or hereafter, may well be adequate."

If this is the intended and probable meaning of this Court's action in vacating and remanding to the Georgia Supreme Court the within case, then should the Georgia Supreme Court authoritatively construe the State statute to engraft upon it the new standards promulgated, it should not apply to the parties before the Court and should be only view prospectively and not retrospectively.

This Court has stated in Linkletter vs. Walker, 381 U.S. 618 (1965) at

attorneys and Mr. Chief Justice Burger.

in his opinion for the majority, as

expressed a disagreement with Mr. Justice

Brennan's view of the effect of the

holding of the majority and also with

Justice

"Other existing State  
statutes, as construed  
herebefore or hereafter,  
may well be affected."

It is in the intended and

probable meaning of this Court's action

in vacating and remanding to the Georgia

Supreme Court the writs case, then should

the Georgia Supreme Court necessarily

construe the State statute to enforce

upon it the new standards promulgated, it

should not apply to the parties before

the Court and should be only prospective

retroactively and not retroactively.

This Court has acted in link

James v. Walker, 351 U.S. 616 (1956) as

page 621:

"A ruling which is purely prospective does not apply even to the parties before the Court."

See also:

England vs. Board of Medical  
Examiners, 375 U.S. 411;

Great Northern RR Co. vs.  
Sunburst Oil and Refining  
Co., 287 U.S. 358.

The newly announced decisions of the U. S. Supreme Court in Miller and Paris represent "a clear break with the past", in the words of Mr. Justice Stewart in Desist vs. U.S.A., 394 U.S. 244, 248 (1969).

Assuming the new constitutionally permissible standards announced by the U. S. Supreme Court to have been unforeseen by the managers of the theatres involved in this case as petitioners on December 28, 1970, then any new construction should be addressed to the prospective ruling only

"A ruling which is purely  
prospective does not apply  
even to the parties before  
the Court."

See also:

Ex parte vs. Board of Medical  
Examiners, 315 U.S. 411  
Great Northern Ry. Co. vs.  
Swainson Oil and Refining  
Co., 191 U.S. 338.

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Wright "a clear break with the past," in  
the words of Mr. Justice Stewart in dissent  
in U.S.A. vs. 324 U.S. 244, 244 (1945).

Assuming the new constitutionally  
permissible standards announced by the  
U. S. Supreme Court to have been understood  
by the managers of the churches involved in  
this case as petitioners on December 18,  
1950, then any new constitution should be  
addressed to the prospective ruling only

and this Court should so state prior to the matter being considered by the Georgia Supreme Court on remand.

C. THE GEORGIA SUPREME COURT UPON FURTHER PROCEEDINGS ON REMAND OF THIS CASE IS TO DISMISS THE SAME IN THAT AN AMNESTY FACTOR IS INVOLVED.

Mr. Chief Justice Burger, in the majority opinion in the case at bar, points to the prospective operation of the newly announced constitutional standard after either future legislative enactment or authoritative judicial construction, when he said:

"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice

and this Court should no more bring to  
the matter being considered by the Georgia  
Supreme Court on record.

THE GEORGIA SUPREME COURT  
FROM FURTHER PROCEEDINGS  
ON RECORD OF THIS CASE IS  
TO DISMISS THE SAME IN  
THAT AN AMNESTY FACTOR  
IS INVOLVED.

Mr. Chief Justice Burger, in

the majority opinion in the case at bar,

points to the prospective operation of

the newly announced constitutional amendment

and states that future legislative action

rest on authoritative judicial consensus

when he said:

"Under the holding announced  
today, no one will be sub-  
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materials unless these materials  
are depicted or described  
patently offensive 'hard core'  
sexual conduct specifically  
defined by the regulating  
State law, as written or con-  
strued. We are satisfied  
that these specific provisions  
will provide fair notice



to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, *supra*, 354 U.S. at 491-492 (1957)."

A fair reading of the quote would suggest that the Court recognized that the standards under which the materials at bar were judged were unconstitutionally vague and pointed merely to the prospective operation of any obscenity statute.

By the action of the Court in vacating and remanding back approximately sixty-eight (68) cases involving both questions and procedures in substance, it would appear that the Court could be allowing an amnesty for the past with the abatement of Redrup and its concepts and the decisional law under Redrup and starting forth under a new set of rules which would apply merely prospectively.

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as to place his public and  
commercial activities in  
a position of disadvantage.  
Holt v. United States, 200 U.S.  
107 (1906).

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standards under which the materials at bar  
were judged were unconstitutionally vague  
and pointed merely to the prospective  
operation of any obscenity statute.

By the action of the Court in ve  
lating and returning back approximately  
twenty-five (25) cases involving both  
questions and answers in substance,  
it would appear that the Court could be  
affording an answer for the past with the  
statement of Justice Brandeis and his colleagues  
the definition law under Brandis and others  
and forth under a new set of rules which  
would apply merely prospectively.

- D. THE GEORGIA SUPREME COURT ON FURTHER PROCEEDINGS ON THE REMAND OF THIS CASE IS TO DETERMINE WHETHER THE NEWLY ANNOUNCED CONSTITUTIONAL CRITERIA FOR JUDGING OBSCENITY APPLY IN THE ABSENCE OF A MODE OF DISSEMINATION WHICH CARRIES WITH IT THE SIGNIFICANT DANGER OF OFFENDING THE SENSIBILITIES OF UNWILLING RECIPIENTS OR OF EXPOSURE TO JUVENILES.

In the Miller case, to which this Court has constantly made reference throughout the holding of the opinion in the within matter, after recitation of the factual summary of the matters involved in that case, in the opinion of the majority under Roman Numeral I, states as follows:

"This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has

D. THE GEORGIA SUPREME COURT  
ON FURTHER PROCEEDINGS ON  
THE REMAND OF THIS CASE  
IS TO DETERMINE WHETHER  
THE NEWLY ANNOUNCED CONSTITUTIONAL  
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In the Miller case, in which this  
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nexus of the matters involved in these  
cases, in the opinion of the majority under  
Roman numeral 3, states as follows:

"This case involves the  
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have been thrust by aggres-  
sive sales action upon un-  
willing recipients who had  
in no way indicated any  
desire to receive such ma-  
terials. This Court has

recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S. 557, 567 (1969). Ginsberg v. New York, 390 U.S. 629, 637-643 (1968). Interstate Circuit, Inc., v. Dallas, supra, 390 U.S. at 690 (1968). Redrup v. New York, 386 U.S. 767, 769 (1967). Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). See Rabe v. Washington, 405 U.S. 313, 317 (1972) (Burger, C.J. concurring); United States v. Reidel, 402 U.S. 351, 360-362 (Marshall, J., concurring) (1971); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). Breard v. Alexandria, 341 U.S. 662, 644-645 (1951); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949); Prince v. Massachusetts, 321 U.S. 158, 169-170 (1944). Cf. Butler v. Michigan, 352 U.S. 380, 382-383 (1957); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 464-465 (1952). It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate

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Swanley v. Georgia, 388 U.S.  
 381, 387 (1967); Minneapolis  
v. New York, 380 U.S. 478;  
 337-343 (1963); International  
Circuit, Inc. v. Dallas,  
 390 U.S. 82, 89 (1968);  
Kedzie v. New York, 388 U.S.  
 387, 389 (1967); Jacobellis  
v. Ohio, 378 U.S. 184, 187  
 (1964); One Case v. Washington  
 405 U.S. 317, 319 (1967)  
 (Burger, C.J. concurring);  
United States v. Roth, 401  
 U.S. 584, 585-587 (1965);  
 1, concurring) (1971);  
Joseph Burstyn, Inc. v.  
Wilson, 343 U.S. 481, 483  
 (1952); Board v. Alexander,  
 341 U.S. 847, 848-849 (1951);  
Kovacs v. Cooper, 336 U.S. 77,  
 88-89 (1949); Prince v.  
Massachusetts, 321 U.S. 438,  
 440-441 (1944); Cl. Butler  
v. Michigan, 352 U.S. 380,  
 382-383 (1957); Public Utilities  
Comm'n v. Pollak, 353  
 U.S. 419, 424-425 (1957). It  
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 standards which must be used  
 to identify obscene material  
 that a State may regulate



without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."

In light of the foregoing, which seemingly is a condition precedent to the enforcement of a State's obscenity laws, the Court speaks of the context in which they define the standards which must separate the protected from the unprotected under the First Amendment.

If the language of the Court in utilizing the term "it is in this context that we are called on to define the standards which must be used. . ." has particular significance, it would seem to be at odds with the terminology set forth as the rationale for permitting a State to regulate obscenity set forth in the opinion of the Court in the within case.

The question is thus presented how do we reconcile and how can the Georgia

without regarding the First Amendment as applicable to the States through the Fourteenth Amendment.

Is this of the foregoing.

which seemingly is a condition precedent to the enforcement of a State's character in law, the Court speaks of the extent in which they define the standards which must separate the procedure from the one presented under the First Amendment.

Is the language of the Court in defining the term "is in each case" that we are called on to define the standards which must be used. It has particular significance. It would seem to be in accord with the terminology set forth as the rationale for permitting a State to regulate obscenity set forth in the opinion of the Court in the White case.

The question is thus presented.

How do we determine and how can the standard

Supreme Court, without further guidance from this Court, reconcile a seeming inconsistency between the standards context of Miller and rejection of the consenting adults theory seemingly implicit in Paris?

Thus, Petitioners contend that a Motion for Rehearing should be granted and the Court restructure its opinion insofar as setting forth the purpose or the duty of the Georgia Supreme Court, to whom this matter is being remanded for further proceedings not inconsistent with Miller vs. California, supra.

The movie "Carnal Knowledge" was

a Mike Nichols production and received an "R" rating from the Motion Picture Association and received serious and critical

... Court, without further evidence  
from this Court, reconcile a seeming in-  
consistency between the standards context  
of Miller and rejection of the sentencing  
theory seemingly implicit in Payne.  
Thus, Petitioner's contention that a  
... should be granted and  
the Court's restrictive use of opinion in order  
as setting forth the purpose of the duty  
of the Georgia Supreme Court, to whom this  
matter is being remanded for further pro-  
ceedings not inconsistent with Miller vs.  
Georgia, supra.

## II.

THE GEORGIA SUPREME COURT, AFTER JUNE 21, 1973 BUT PRIOR TO THE MANDATE HEREIN REMANDING AND VACATING, HAS NOW PURPORTEDLY AUTHORITATIVELY CONSTRUED THE GEORGIA STATE OBSCENITY STATUTE IN A MANNER INCONSISTENT WITH THE STANDARDS FASHIONED BY THIS COURT IN MILLER VS. CALIFORNIA.

The Georgia Supreme Court, on July 3, 1973 in a case entitled Jenkins vs. The State, No. 27692, in a 4-3 decision, held that the Georgia obscenity law was constitutional and that the accusation was framed in the proper language and that the jury's verdict utilizing local community standards of the forum, i.e., Dougherty County, Georgia, was correct in holding that the movie "Carnal Knowledge" was obscene under Georgia Law.

The movie "Carnal Knowledge" was a Mike Nichols production and received an "R" rating from the Motion Picture Association, and received serious and critical

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The Georgia Supreme Court, on

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jury's verdict reflecting local community

standards of the time, i.e., December

County, Georgia, was correct in holding

that the movie "Carnal Knowledge" was ob-

scene under Georgia law.

The movie "Carnal Knowledge" was

a Mike Nichols production and received an

"R" rating from the Motion Picture Association

and received various and official



reviews in many newspapers throughout the United States including The Washington Post, The Evending Star, the New York Times and Atlanta Constitution. The majority of the justices of the Supreme Court of Georgia, in discussing Georgia obscenity statutes, state in pertinent part as follows:

"It is our view that a statute can provide criminal punishment without the definition of obscenity being included within that specific code section. . ."

"The Miller case, supra, further held that juries can consider State or local community standards in lieu of 'national standards' . . ."

"This Court has held that the exhibition of an obscene picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. . ."

"The Supreme Court of the United States which in effect has affirmed the Paris case, supra, held that the States

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... that held that justice can  
... Georgia or local case  
... standards in lieu of  
national standards.

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... of an offense gov-  
erns is a crime involving  
the welfare of the public at  
large, and is in contrast  
to the standards of decency  
and propriety of the commu-  
nity as a whole.

"The Supreme Court of the  
United States which in Miller  
has affirmed the Miller case  
... held that the Miller

have a legitimate right in regulating commerce and obscene materials. . . ." (Emphasis supplied.)

"We hold that the evidence in this record amply supports the verdict of guilty by the showing of the film 'Carnal Knowledge', in violation of the definition of distributing obscene materials under our Georgia statutes. . . ."

As stated, this was a 4-3 decision and the foregoing comments were taken from the majority opinion. The following comments are taken from the dissenting opinion:

"Today's majority decision has drastically narrowed the concept of the First Amendment as applied to the performing arts in Georgia and 'local communities' in Georgia. . . ."

"The decision of the Supreme Court of the United States in Miller vs. California, supra, inaugurated a new era in the continuing constitutional contest between obscenity-pornography and the First Amendment. . . ."

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"We hold that the evidence  
in this record amply supports  
the verdict of guilt by the  
grand jury. The evidence  
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the definition of obscenity  
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"The decision of the Supreme  
Court of the United States  
in Miller vs. California,  
1973, 413 U.S. 15, 40 L. Ed. 2d 758,  
13 S.Ct. 1307, 1973-1, 38 U.S.L.W. 3685,  
is the controlling authority  
in this case. The majority  
decision in Miller vs. California  
is the First Amendment.

"Miller gave a new definition of pornographic unprotected material. Miller laid down basic guidelines for the trier of fact to use in determining what is protected material from what is unprotected material; Miller changed the yardstick. . ."

". . . the Miller criteria had been applied by the majority in this case, affirming the Appellants' conviction. That that can be done, and for the majority to have done it in this case is, in my view, a denial of due process of law to the Appellant."

"To me, this retroactive application of the Miller yardstick has the effect of saying that a theater operator could rely on Jacobellis in January, 1972 in deciding whether to exhibit a film, but in April, 1973, when he was tried before a jury for exhibiting the film, it was all right for the court and jury to completely ignore the standard established by Jacobellis and apply a different standard which had not been enunciated at the time of the trial, and which would not be established by the Supreme Court of the United States until June 21, 1973."

Miller gave a new definition  
of "personnel" and suggested  
material. Miller said down  
based Miller and the  
that of last to use in future  
which was to provide  
material from what is known  
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by the Supreme Court of the  
United States until June 11,  
1957.



"In Division 4 of the Miller opinion, the Chief Justice [Burger] said: 'the dissenting justices sound the alarm of repression. . . these doleful anticipations assume that courts cannot distinguish commerce and ideas protected by the First Amendment from commercial exploitation of obscene material.'"

". . . My experience with this one case teaches me that the alarm of repression was validly sounded; it also teaches me that Miller's majority assumption, that courts can distinguish commerce and ideas that are protected from exploitation from obscene materials that are not protected, is a too optimistic assumption."

See also the commentary in Time Magazine July 16, 1973 at page 73 under the sub-heading "See No Evil," which discusses the Georgia Supreme Court decision.

If the Georgia Supreme Court by its decision of July 3, 1973 has refused to follow the suggestions of the majority of this Court in fashioning new standards under Miller vs. California,

"In Division 4 of the Miller  
opinion, the Chief Justice  
[Burger] said: 'The dissenting  
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See also the commentary in Time Magazine

July 16, 1973 at page 35 under the sub-

heading "See No Evil" which discusses

the Georgia Supreme Court decision.

At the Georgia Supreme Court

by its decision of July 1, 1973 has re-

fused to follow the suggestions of the

majority of this Court in Tennessee new

statute under Miller vs. California.

it is not necessary for this case to be vacated and remanded to determine whether the statute is void for vagueness because of unconstitutionality on its face, and should be held to be such by this Court.

When dealing with a claim of void for vagueness in the pñeumbra of the First Amendment, we must be mindful of a decision of the United States Supreme Court in U.S.A. vs. National Dairy Products Corp., 372 U.S. 29, 32 (1963), wherein the Court stated:

"In this connection we also note that the approach to 'vagueness' governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See Thornhill v. [State of] Alabama, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 [9 L. Ed. 2d 405] "

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742, 84 L.Ed. 1093 (1940).  
N.A.A.C.P. v. Houston, 371  
U.S. 415, 83 S.Ct. 312

If the Georgia Supreme Court refuses to authoritatively construe the statute in a manner consistent with the rationale of this Court and the standards fashioned in Miller, then this Court should grant the Petition for Rehearing and rule the statute to be repugnant to the Constitution of the United States for vagueness.

### III.

THIS COURT SHOULD GRANT A REHEARING OR, IN THE ALTERNATIVE, MODIFY ITS DECISION TO HOLD THAT THE MOTION PICTURE FILMS INVOLVED IN THE CASE AT BAR ARE OR WERE PROTECTED EXPRESSION CONSISTENT WITH THE RULINGS OF THE MAJORITY OF THIS COURT IN THE THIRTY-ONE CASES FOLLOWING REDRUP VS. PEOPLE OF THE STATE OF NEW YORK, 386 U.S. 767.

This case arose in December, 1970 and was tried and decided by the lower court on the basis of Redrup vs. People of the State of New York. The

12

11 The American Express Company is

issued to authoritatively consider the  
matter in a manner consistent with the  
principles of this Court and the standards  
established in Miller, then the Court  
should grant the petition for rehearing  
and this the case to be presented to  
the Court of the United States

for rehearing.

III.

THIS COURT SHOULD GRANT A  
REHEARING OR, IN THE ALTERNATIVE,  
MODIFY ITS DECISION  
TO HOLD THAT THE MOTION  
FOR REHEARING IS  
WARRANTED BY THE FACTS OF THE  
CASE AT BAR AND OR WHERE  
REHEARD REHEARING COMES  
SISTENT WITH THE HOLDINGS OF  
THE MAJORITY OF THIS COURT  
IN THE THIRTY-ONE CASES  
FOLLOWING Miller vs. People  
OF THE STATE OF NEW YORK,  
100 U.S. 101

This case arose in December,

1875 and was tried and decided by the

Justice on the basis of People vs.

People of the State of New York, the



25

court found that this was a close case and as such it was to look to the circumstances of dissemination to determine whether or not the material fell on the unprotected side of the ledger. Setting as a fact finder and determining that there was no 'pandering, no intrusion into the privacy of unwilling adults or dissemination of the materials to juveniles, the court concluded that the materials could not be said to be obscene in the constitutional sense.

Whatever this Court has done to reject the casual approach of Redrup, the reliance upon the court's actions in the Redrup series of cases, the material should be viewed in the context of those materials declared by the majority of the court in each of the cases not to be obscene in the case at bar. Whatever change of standards is promulgated for the future, the failure of this Court to

Don't know that this was a close case and

as such it was to look to the circumstances

of determination to determine whether or not

the material fell on the unprotected side

of the ledger. Seeing as a last letter

and determining that there was no material

so information into the privacy of unwilling

action or dissemination of the materials to

anyone, the court concluded that the

materials would not be said to be obscene

in the nonfunctional sense.

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correct the narrow approach of Beatty, the

relation upon the court's action in the

Beatty series of cases, the material

should be viewed in the context of these

materials declared by the majority of the

court in each of the cases not to be ob-

scene in the case at bar. Whatever

degree of standards is promulgated for

the future, the failure of this Court to

rule on the issue of the obscenity of the materials in light of the Redrup series of cases as those cases appeared through 1970, should be the subject for rehearing and reconsideration in the interests of the Petitioners' First and Fifth Amendment rights.

### CONCLUSION

Petitioners herein would reiterate all of the constitutional arguments presented but not heretofore discussed in this Petition for Rehearing, set forth in their Petition for Certiorari and Brief, and ask the Court to reconsider all of those arguments on the question of rehearing.

Since the decision of this Court, which created as many new questions and problems as it apparently purported to solve, the following acts have occurred

rule on the issue of the necessity of the  
petitioner in light of the leading cases of  
cases as those cases appeared through 1770,  
should be the subject for rehearing and re-  
consideration in the interests of the  
petitioners' First and Fifth Amendments.  
Hopes.

### CONCLUSION

Petitioners herein would re-  
iterate all of the constitutional argu-  
ments presented but not rehearings dis-  
missed in this Petition for Rehearing,  
and fourth in their Petition for Certiorari  
and writ of Habeas Corpus, and ask the Court to  
reconsider all of those arguments on the  
question of rehearing.  
Since the decision of this  
Court, which created so many new questions  
and problems as it apparently purposed  
to solve, the following acts have occurred

at the instigation of law enforcement officials:

(a) In Louisville, Kentucky, on Friday, July 13, 1973, approximately 200,000 magazines and books were burned on ex parte order of a trial judge without notice to the defendants. All of these books and magazines had been the subject of seizures without search warrants; and the prosecutorial practice employed there was condemned by the U. S. Supreme Court in Rhoaden vs. Kentucky, decided on June 25, 1973;

(b) A prosecutor entered an adult bookstore in Knoxville, Tennessee and seized under a general warrant approximately 873 different books and magazines which he felt, in his opinion, were obscene employing the Roth-Memoirs test; This was done on approximately June 26, 1973. After the seizure of one copy of

at the investigation of the defendant  
at the time.

(a) In Louisville, Kentucky, on

Friday, July 13, 1934, approximately

500 000 magazines and books were printed

on a large order of a retail judge without

notice to the defendant. All of these

books and magazines had been the subject

of seizures without search warrants, and

the prosecutorial practice employed there

was condemned by the U. S. Supreme Court

in Whippen vs. Kentucky, decided on

June 28, 1933.

(b) A prosecutor arrived in Louisville

on Monday in Louisville, Tennessee and

arrived under a general warrant approx-

imately 800 different books and magazines

which he felt, in his opinion, were

obscene according to the North American test.

This was done on approximately June 15,

1933. After the seizure of one copy of



each publication, the court issued an injunction prohibiting the sale or exhibition of any remaining copies of the books and magazines seized, thus creating a total prior restraint;

(c) On or about June 22, 1973, the mayor of Macon, Georgia led a raid on several supermarkets and made seizures and arrests for "Playboy" and "Oui" magazines;

(d) On or about June 28, 1973 the district attorney arrested the proprietor of a 7-11 foodstore in Savannah, Georgia under the Georgia obscenity law for selling a mild sex scandal newspaper entitled the "National Insider;"

(e) On or about June 23, 1973, a prosecuting attorney in Montgomery, Alabama arrested the proprietor of a magazine stand in the Greyhound Bus Terminal on the charge of selling "Playboy"

also petition, the court issued an order  
prohibiting the sale of exhibition  
of any remaining copies of the books and  
magazines seized, thus creating a total  
ban on the sale.

(c) On or about June 12, 1933, the  
court of Georgia issued a writ of  
seizure against the books and magazines and  
magazines for "Pisces" and "Owl" magazines.

(d) On or about June 18, 1933 the  
district attorney arrested the proprietor  
of a 7-11 bookstore in Savannah, Georgia  
under the Georgia obscenity law for selling  
a well known scandalous magazine entitled  
"National Enquirer".

(e) On or about June 22, 1933, a  
prosecuting attorney in Montgomery,  
Alabama arrested the proprietor of a  
magazine stand in the Grayhound Bus  
terminal on the charge of selling "Pisces".

magazine, in violation of the Alabama obscenity law;

(f) In Charlottesville, Virginia cases have been made during the first week of June against stores which are selling "Playboy" magazine, for violation of the common laws of the Virginia obscenity statutes;

(g) On or about July 1, 1973 in Tulsa, Oklahoma, prosecutors, with the concurrence of the trial judge but without any adversary hearing, seized approximately 100,000 books and magazines representing in all copies of about 1,200 different titles, in the guise of the enforcement of the State of Oklahoma obscenity statutes;

(h) On or about July 11, 1973, the police in Columbus, Georgia seized all books and magazines, as well as store equipment, cash registers and the like,

magazines, in violation of the Alabama

statutes.

(1) In Charlottesville, Virginia

there have been made during the first week

of this month stores which are selling

"Playboy" magazine, in violation of the

common laws of the Virginia community.

Statute.

(2) On or about July 1, 1953, in

Eliza, Oklahoma, prosecutors, with the

assent of the trial judge but without

any adversary hearing, seized approximately

100,000 books and magazines representing

in all copies of about 1,500 different

titles, in the guise of the enforcement

of the State of Oklahoma community

statute.

(3) On or about July 1, 1953, the

police in Columbia, Georgia seized all

books and magazines, as well as other

equipment, cash registers and the like.

in the guise of enforcing the State of Georgia obscenity law;

(i) On or about July 14, 1973, prosecution officials in the City of Birmingham, Alabama seized approximately 20 to 30,000 publications out of an adult bookstore, which represented all copies of the publications, in the guise of enforcing the State of Alabama obscenity statute.

This grouping of events which counsel represents have occurred since June 21, 1973 represent but a small percentage of the number of incidents which have occurred with regularity by over-zealous polic officials and prosecutorial authorities in the guise of enforcing respective State obscenity statutes.

Hopefully, by the time this Court has an opportunity to consider this

in the guise of entering the State of

without opportunity for

the State of Alabama, 1937.

prosecution officials in the City of

Montgomery, Alabama, advised approximately

10 to 15,000 publications were at the State

Department, which represented all of the

of the publications in the State of

during the State of Alabama, especially

therefore

This grouping of events which

national representatives have occurred since

and 21, 1937 represent but a small part

of the number of incidents which

have occurred with regularity of over

several public officials and governmental

authorities in the State of Alabama

respective State recently stated

Respectfully, by the time this

part has an opportunity to consider this



Petition for Rehearing after the Court reconvenes in October, we shall be in a position to furnish the Court before that time a documentation of numerous abuses that have occurred in the name of bona fide law enforcement.

These very things to which we point have had and threaten to have the effect of causing a "chilling of speech" and inducing self-censorship, which will stiffen artistic expression and creativeness for the future.

Surely, in the face of these abuses as they can be documented, if we are to await an independent appellate review by the U. S. Supreme Court some two or three years hence as to each one of these matters, there will be nothing left to review because the forces of censorship will have stifled all expression that is in any way related to the sex field.

petition for rehearing after the Court has  
granted a writ, we shall be in a position  
to furnish the Court before that time a  
demonstration of numerous others that have  
appeared in the case of some like law  
provisions.

There very much to which we  
must have had and therefore to have  
the effect of passing a "bill of  
rights" and inducing self-censorship,  
which will stifle artistic expression  
and responsiveness for the future.

Finally, in the face of these  
facts as they can be documented, it is  
not to wait an independent appraiser  
review by the U. S. Supreme Court and  
on these facts there is no such case of these  
matters, there will be nothing left to say  
view because the focus of censorship  
will have stifled all expression that is  
in any way related to the sex field.

The majority makes reference in its decision to the Hill-Link Minority Report of the Commission on Obscenity and Pornography. It is interesting to note that Father Morton Hill, one of the authors of that dissent in a trial in which this counsel participated, when asked to define how he would arrive at what contemporary community standards were in a community, stated that anything that could not appear on public television with children and adults watching, and anything that could not appear on the front page of the daily metropolitan newspaper, would be violative of the contemporary community standard. Father Hill's narrow thinking and restrictions he would impose upon what contemporary community standards were would, if adopted by this Court and permitted to flourish, restrict the level of what adults could read and see to that of children, a view which counsel thought had been rejected by this Court in Butler vs. Michigan, 352 U.S. 380 (1957).

The company's sales volume is

...to the Hill-Like Ministry ...

1. Administrative - to date that 1971 1970

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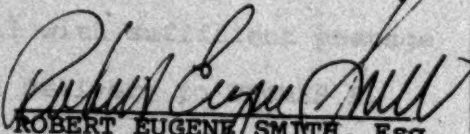
at Blue, together with the following:

... if adopted by the Court and per-

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

For the reasons stated herein,  
as well as predicated on the arguments  
contained in the original Petition for  
Certiorari and Brief of Petitioners, the  
Court should reconsider and grant the  
Petition for Rehearing.

Respectfully submitted,



ROBERT EUGENE SMITH, Esq.

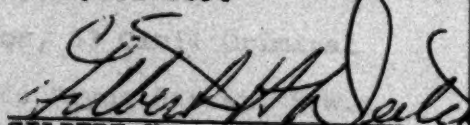
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GILBERT H. DEITCH, Esq.

Suite 2005

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1175 Peachtree St., N.E.

Atlanta, Georgia 30361

(404) 892-8890

Attorneys for Petitioners

For the reasons stated herein  
as well as presented on the exhibits  
contained in the original petition for  
enforcement and relief of petitioners, the  
court should reconsider and grant the  
petition for rehearing.

Respectfully submitted,

*[Signature]*  
JAMES HUGHES SMITH, Esq.  
Suite 1002  
One Hundred Colony St.  
1112 Peninsula at N.W.  
Alhambra, Georgia 30311  
(404) 502-2550

*[Signature]*  
WILLIAM B. DILLON, Esq.  
Suite 1002  
One Hundred Colony St.  
1112 Peninsula at N.W.  
Alhambra, Georgia 30311  
(404) 502-2550

Attorneys for Petitioners





## CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the within and foregoing Petition for Rehearing was served upon opposing counsel by placing same in the United States Mail with sufficient postage thereon to ensure delivery to THOMAS E. MORAN, Esquire, Suite 820 Northside Tower, 6065 Roswell Road., N. W., Sandy Springs, Georgia 30328 and THOMAS R. MORAN, Esquire, Assistant Solicitor, 53 Civil Criminal Court Building, 160 Pryor Street, S.W., Atlanta, Georgia 30303, Attorneys for Respondents.

This 16th day of July, 1973.



ROBERT EUGENE SMITH

CERTIFICATE OF SERVICE

This is to certify that a true

and exact copy of the within and foregoing

petition for habeas corpus was served upon

opposing counsel by placing same in the

United States Mail with sufficient postage

thereon to ensure delivery to THOMAS E.

KORAN, Esquire, Suite 415 Northside Tower

4401 Kowalew Road, N. W., Sandy Springs

Georgia 30318 and THOMAS E. KORAN, Esquire,

Assistant Solicitor, 23 First Criminal

Court Building, 180 Pryor Street, S.W.,

Atlanta, Georgia 30303, respectively for

recordation.

This 15th day of July, 1971

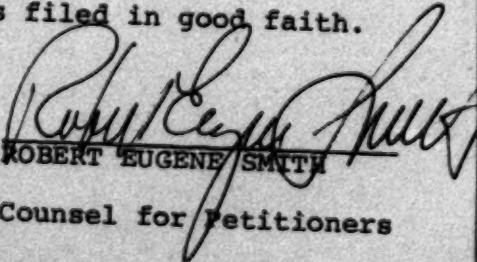
ROBERT ELLIOTT SMITH

## CERTIFICATE OF COUNSEL

ROBERT EUGENE SMITH, one of the attorneys for Petitioners, does state and affirm that the Petition for Rehearing to which this certificate is attached is presented by counsel to the Court in good faith and not for the purposes of delay.

The decision of the Court in this case in which a rehearing is sought was a clear departure from the prior decisions of this Court, and was reached by a sharply divided Court.

The circumstances are such that it should be patently clear that the within Petition is filed in good faith.



ROBERT EUGENE SMITH

Counsel for Petitioners